FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

NO. 540.

ESTATE OF CHARLES M. THORP, Deceased, GOLDIE D. THORP and FIDELITY TRUST COMPANY, Executors, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITIONERS' REPLY BRIEF.

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Respondent's brief contains a number of inaccurate statements, two of which should not go unanswered:

1. On page 9, Respondent asserts that the likelihood of the possibility of a child of decedent dying childless is not shown by the record. This assertion is obviously incorrect in view of the finding of fact by the Court below, viz., "Decedent's wife predeceased him, as did one child, *who left no issue.*" See opinion of the Court below at top of page 3. By not resorting to the termination machinery, the surviving life beneficiaries now enjoy a substantially larger share of the income than prior to the death of the child "who left no issue." That of itself should establish conclusively that the in-

terest of the life beneficiaries was substantially adverse to termination, and we submit that the Court below erred in not so holding. In any event, however, Respondent's argument of the likelihood of the possibility of an event occurring is beside the point when the event has occurred.

2. On page 11 of Respondent's brief, the alleged distinction between the instant case and *Helvering v. Helmholz,* 296 U. S. 93, is wholly inaccurate. Termination in *Helvering v. Helmholz* was dependent not, as Respondent asserts, upon the consent of all the beneficiaries, but upon the consent of "all of the then beneficiaries, other than testamentary appointees." As appears from the report of the case in the Circuit Court of Appeals for the District of Columbia, 75 F. 2d, 245, at page 246, there were contingent, unascertained beneficiaries, whose consent to termination was not required. The life beneficiaries had a power of appointment by Last Will and Testament of the income of their respective shares of the trust. If they should fail to exercise that power of appointment, their issue would become entitled to a life interest in the trust, and if there were no issue, the income of that share was to be paid to the other life beneficiaries. Upon termination of the trust, the principal of each share was to be distributed to the issue of the life beneficiary, and if no issue, then to the issue of the other life beneficiaries. It thus appears that, except for the power of appointment, the devolution in *Helvering v. Helmholz* was almost identical with the devolution in the instant case. Moreover, the provision in the trust indenture in *Helvering v. Helmholz,* which vested the power of termination in all of the *then* beneficiaries, other than testamentary appointees, could

have referred only to the life beneficiaries. In that respect, the trust was similar to the trust in the instant case. It is true that this Court mentioned the section of the "Restatement of Trusts" which provides that a trust can be terminated where all beneficiaries are sui juris and consent thereto, and in a note stated, "We are referred to no authority to the contrary in Wisconsin, the place of the transaction." This would seem to be a misapplication of the "Restatement," in view of the fact that the trust in *Helvering v. Helmholz* did not require the consent of all the beneficiaries, but only of all of the then beneficiaries, meaning the life beneficiaries, to terminate the trust.

Respectfully submitted,

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